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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

J.G., Petitioner, v. THE SUPERIOR COURT OF RIVERSIDE COUNTY, Respondent; RIVERSIDE COUNTY DEPARTMENT OF PUBLIC SOCIAL SERVICES, Real Party in Interest.	E064043 (Super.Ct.No. SWJ1400373) OPINION

ORIGINAL PROCEEDINGS; petition for extraordinary writ. Timothy F. Freer, Judge. Petition is granted.

Brent L. Valdez, for Petitioner.

No appearance for Respondent.

Gregory P. Priamos, County Counsel, James E. Brown, Guy B. Pittman, and Julie Koons Jarvi, Deputy County Counsel.

In this matter petitioner J.G. (Father), the father of the minors involved, challenges the trial court's decision to deny him reunification services under Welfare and Institutions Code section 361.5, subdivision (b)(2).[1] We agree that the denial was in error and grant the petition.

STATEMENT OF FACTS

Because the issue involves the denial of services rather than the propriety of exercising jurisdiction over the minors, our recitation of the facts need not be extensive. The three minors—aged four years and under—first came to the attention of the Department of Public Social Services (Department) on or about April 15, 2014, based on a referral for general neglect. The apartment in which the mother (Mother) lived with the children[2] was infested with cockroaches and other insects; there was old food on the dirty stove and dirty dishes in the sink. The parents reported that one of the minors, H.G., had been diagnosed with seizures. They did not remember the name of her medication and had run out the day before. Everyone in the house had a rash; the parents claimed to have taken the children to the doctor but did not have medication to treat the rash.

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[1] All subsequent statutory references are to the Welfare and Institutions Code.

[2] Father indicated that he did not reside in the home, but there were later indications that he did but did not wish to jeopardize Mother's receipt of public benefits. Still later he told the social worker that he could not live with Mother until they were married due to his religious beliefs.

The social worker later learned that the children had *not* been taken to a doctor to be seen for the rash. Moreover, H.G.'s seizure medication had not been refilled since June 2013.

The oldest of the children, T.G., told the social worker that she sometimes had to ask neighbors for food and reported verbal and some physical domestic abuse. Father informed the social worker that he had been diagnosed with a bi-polar condition but did not take his medication because he did not like the way it made him feel.

At this time the parents agreed to cooperate and receive services while retaining custody of the children. Both parents were to receive mental health assessments. The court made the appropriate orders on May 5, 2014.

On November 13, 2014, the Department filed a status review report seeking to continue the plan in effect. Father had not yet completed his mental health assessment and although he had attended one session with a counselor, he had not returned because, he said, he was waiting for the counselor to call him. He had completed a parenting class. Mother had not yet completed her application for Inland Regional Center services. The social worker noted that both parents needed "a great deal of in-home support and encouragement" and needed assistance in organizing and planning for critical matters such as school and medical appointments. The court again followed the recommendation.

On February 25, 2015, the Department filed a new petition seeking to have the minors removed with no further services. The social worker reported that H.G. had been

observed at school with red finger-shaped marks on her face and other red marks on her neck.[3] H.G.'s teacher told the social worker that Father had been abrupt and evasive towards the teacher's attempts to get him to come in for a meeting and discuss H.G.'s education.

When the social worker went to the home, Father said the children played hard together and H.G. got the red marks that way. Mother mentioned that H.G. recently fell but she did not see it.

At this time, the family home was again filled with trash and clutter; there was minimal food in the home and the parents said they would not receive their new food stamps for two weeks. The backyard, where the children played, was full of cans, bottles, and trash.

The parents were also apparently not complying with H.G.'s medication requirements, telling the social worker that her doctor had ordered her seizure medication stopped. However, the medication Keppra had been prescribed in early January, with H.G.'s next appointment scheduled for three months from the exam date.

The minors were removed and placed in foster care. The court approved.

By the time of the full report filed March 24, 2015, the parents had acquired a new apartment, which was in a relatively clean and suitable condition. However, Father had

[3] H.G. is developmentally delayed and was not able to give a reliable account of how the marks were incurred.

not attended any more counseling sessions and had not completed a medication evaluation.

Eventually both parents were psychologically evaluated.[4] Father related one suicide attempt in 2006, although the reasons prompting the attempt were not explored. He denied taking any medications since 2007.

Dr. Robert Suiter noted that Father had been diagnosed with bi-polar disorder but did not make this diagnosis himself. However, Dr. Suiter also recorded that the results of the Minnesota Multiphasic Personality Inventory-2 were "likely invalid" due to Father's attempts to present himself in a favorable light. The result of a Personality Assessment Inventory was also deemed unreliable due to inconsistencies which may have resulted from "reading difficulties, careless or random responding, marked confusion, or idiosyncratic item interpretation." The Child Abuse Potential Inventory was noted as "marginally valid" and reflected some risk of abuse due to personal rigidity. Dr. Suiter made a diagnosis on Axis II of "Personality Disorder, NOS with Antisocial and Narcissistic Traits."

Overall, however, Dr. Suiter believed that Father would not benefit from further services because he did not acknowledge that his parenting style or capabilities needed improvement. Dr. Suiter commented that the available data from the evaluation did not indicate that Father had a mental disorder, but that Father would be "very formidable in his resistance in the event he were seen for any type of individual psychotherapy."

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[4] We will go into more detail about the evaluations later.

Father was also seen by Dr. Edward Ryan, who affirmatively diagnosed him with bi-polar disorder although it was noted "by history." Dr. Ryan noted Father's passive, dependent lifestyle as reflected in his lack of employment over the past 11 years while he has relied primarily on Mother's public benefits. While Dr. Ryan reported that Father tested in the "dull normal" range and was theoretically capable of learning and changing, his personality was such that he tended to do the minimum necessary to "get by." Dr. Ryan's final opinion was that Father's ability to benefit was marginal, based upon his cognitive ability, but that his effective likelihood of benefiting was very small due to his lack of motivation.

At the hearing no testimony was taken and argument focused on whether services could be denied to the parents under section 361.5, subdivision (b)(2), which authorizes the denial of services if a parent "is suffering from a mental disability that is described in Chapter 2 (commencing with Section 7820) of Part 4 of Division 12 of the Family Code and that renders him or her incapable of utilizing those services."

The trial court took jurisdiction over the minors and denied services.

DISCUSSION

Family Code sections 7820 et seq. deal with the conditions under which a petition to have a child declared free from the custody and control of a parent may be filed. Family Code section 7827 deals with the "mentally disabled" parent, and provides that "(a) 'Mentally disabled' as used in this section means that a parent or parents suffer a mental incapacity or disorder that renders the parent or parents unable to care for and

control the child adequately." Subdivision (c) provides that the testimony of two medical professionals is required to support a finding under that statute. Although section 361.5, subdivision (b)(2), does not expressly incorporate the requirement of two experts, case law holds that the requirement is at least implicit. (See *In re C.C.* (2003) 111 Cal.App.4th 76, 83 [Fourth Dist., Div. Two].)

Father argues first[5] that the trial court's finding cannot be upheld because Dr. Ryan and Dr. Suiter did not both describe a mental disability, noting that Dr. Ryan listed an Axis I diagnosis of bi-polar disorder by history and Dr. Suiter did not. It is true that Dr. Suiter did not make any such finding, but he did note Father's known history of such a diagnosis and Father's participation in diagnostic tests was so evasive and unsatisfactory that Dr. Suiter could not reach a personal diagnosis. A parent cannot prevent the operation of section 361.5 by refusing to cooperate. (See *In re C.C.*, *supra*, 111 Cal.App.4th at p. 85.) Nor do we believe it necessary that both experts reach the same conclusion with respect to the parent's specific mental disability; the purpose of the two reports is simply to provide the court with information and evidence from which it can conclude that the parent does, or does not, suffer from a "mental disability" that makes it impossible for him or her to benefit from services. (*Curtis F. v. Superior Court* (2000) 80 Cal.App.4th 470, 474 (*Curtis F.*)

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[5] The petition actually begins by asserting that "there was no showing that Father had not made reasonable efforts to subsequently treat the problems that led to a prior dependency resulting in a sibling's removal." This appears to be a reference to section 361.5, subdivision (b)(10), which is not at issue in this case. The quoted statement appears to have been inserted inadvertently.

However, this leads us to the other point that we believe Father makes: that the reports, taken together, do not constitute substantial evidence that he suffers from *any* mental disability that has the *causative effect* of making him unable to benefit from services. (See *Curtis F.*, *supra,* 80 Cal.App.4th at p. 474 [on the standard of review].)

Even if both evaluators found (as we think they did) that Father suffered from some level of bi-polar disorder, neither gave any reasoning as to why this disorder affected his inability to benefit from services. We return to the specific language of the reports.

Dr. Ryan found that Father functioned in the "dull normal" range of intelligence. Other test results reflected that Father had a "passive response style to coping with the stresses and demands of life. He tends to be 'happy go lucky'. . . he deals with frustration in a passive manner and that can lead to aggression out of frustration as opposed to out of anger." Father's Rorschach tests showed an "impulsive response style" with low empathy rankings and "poor judgment." Dr. Ryan then noted that Father had failed to seek medical assistance with his bi-polar disorder although nothing in his report tied Father's deficiencies to that disorder or indicated how medication would, or might, change his behavior or functioning. "The lack of progress in terms of using resources available to him over the past year indicate that he has little to no desire to utilize services and gain from them, which is a negative prognostic sign." "Without motivation to learn and benefit, a person does not learn or benefit." While we do not disagree with the general import of these observations, section 361.5, subdivision (b)(2), requires that a

parent be *incapable* of utilizing services due to a "mental disability" that "renders" him or her so incapable. The statute is not satisfied where the parent has a mental disorder with no explained relationship to his *reluctance* or *unwillingness* to make changes. "Incapable" and "doesn't want to" are not synonymous.

Dr. Suiter's report is not much more germane to the critical issues. He did note that Father admitted having "mood swings," but Dr. Suiter's description of Father was that he was well-groomed, "alert, cooperative, and oriented in all spheres. His speech was of adequate rate and volume and his behavior was normal. His recent and remote memory appeared to be intact as was his attention and concentration." Dr. Suiter saw no sign that Father was responding to "internal stimuli." These comments are not reflective of a mental disability or disorder. Dr. Suiter also expressly commented that there was no indication of any paranoia or grandiosity.

As we have noted, Dr. Suiter felt that Father did not honestly complete most of the psychological tests. However, this is not a case in which there is other evidence from which the conclusion of a mental disability can be drawn. (Cf. *In re C.C., supra,* 111 Cal.App.4th at pp. 80-81 [in which, despite the mother's refusal to participate in an evaluation, there was ample other evidence available to the court of the parent's bizarre statements and behavior].) Indeed, Dr. Suiter conceded that the "data from the evaluation did not indicate that he has a mental disorder and, therefore, there is no need for psychotropic medication."

Furthermore, Dr. Suiter's specific comments about Father did not relate to any mental disorder but rather to his *personality*. Thus, Dr. Suiter noted that Father "did not take the situation seriously and/or accept any responsibility for any concerns within their home," had "difficulty with rules and authority . . . *this is a characterological presentation*. . . ." (Italics added.) Dr. Suiter continued with the opinion that Father presented "as an individual who is very opposed to any intrusions into his life . . . very put off by anyone attempting to look over his shoulder in terms of his conduct and/or his parenting . . . he would be most unwilling to accept any perceived criticism of his conduct . . . ." Dr. Suiter concluded that "there is no reasonable likelihood [Father] would benefit from reunification services and he simply does not consider there is anything he needs to change or improve upon."

Once again we are compelled to point out the distinction between "unwilling" and "incapable," as well as the statutory requirement that the parent's inability to utilize reunification services be the result of a mental disorder. (See *In re Rebecca H.* (1991) 227 Cal.App.3d 825, 843-844.) We recognize that on this record Father does not appear to be a prime candidate for success and the concerns expressed by Drs. Suiter and Ryan concerning his motivation and self-awareness are in some ways legitimate. But when children are removed from parental custody, reunification is the goal and there is a presumption that a parent will receive reunification services. (*In re K.L.* (2012) 210 Cal.App.4th 632, 640-641.) Unless a statutory exception applies, services must be provided even if the chances of success appear slim. (*In re Taylor J.* (2014) 223

Cal.App.4th 1446, 1451, citing *Mark N. v. Superior Court* (1998) 60 Cal.App.4th 996, 1010-1011.)

The applicability of any exception must be proved by clear and convincing evidence. (§ 361.5, subd. (b).) As we have explained above, there is not sufficient evidence that Father was incapable of utilizing services due to a mental disability, rather than being unlikely to do so for "characterological" reasons. The Legislature has concluded that people can change and parents must be given an opportunity to do so unless the ability to change is impacted by a recalcitrant or untreatable mental condition. That was not shown to be the case with respect to Father, and the trial court erred in denying him services under section 361.5, subdivision (b)(2).

DISPOSITION

The petition is granted. The Superior Court of Riverside County is directed to vacate its order denying reunification services to petitioner, and to enter a new order authorizing such services.

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McKINSTER
J.

We concur:

HOLLENHORST
Acting P. J.

KING
J.